

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 10, 2001 Session

LANDWORKS, INC., ET AL. v. JOHN LESLIE VICK

**Appeal from the Chancery Court for Cocke County
No. 00-057 Telford E. Forgety, Jr., Chancellor**

FILED FEBRUARY 19, 2002

No. E2001-00615-COA-R3-CV

Landworks, Inc., and Dorothy Meadors (“Plaintiffs”) filed this lawsuit seeking, among other things, a declaration that they were the rightful owners of a certain tract of land in Cocke County. The adjoining land owner, John Vick (“Defendant”), claimed he was the owner of the disputed area and filed a counter-claim. Both Plaintiffs and Defendant had deeds which purported to convey to them the disputed area. The property taxes on the disputed area had been paid for more than the last twenty years by Plaintiffs or their predecessors in title. The Trial Court found in Plaintiffs’ favor, relying in large part on the presumptions found in Tenn. Code. Ann. §§ 28-2-109 and 28-2-110. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Chancery Court Affirmed; Case Remanded.**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, J., and WILLIAM H. INMAN, SR. J., joined.

Fletcher L. Ervin, Newport, Tennessee, for the Appellant John Leslie Vick.

William M. Leibrock, Newport, Tennessee, for the Appellees Landworks, Inc., and Dorothy R. Meadors, Trustee of the Dorothy R. Meadors Revocable Trust.

OPINION

Background

Plaintiffs own land in Cocke County. Defendant owns property adjacent to Plaintiffs' property. The main dispute in this case is whether Clear Creek is the boundary line between these properties. Plaintiffs claim the center of Clear Creek is the boundary. Defendant claims he owns the land on the west side of Clear Creek as well as a portion of the land on the east side.

This lawsuit was filed shortly after Landworks, Inc. ("Landworks") began developing its property, including the property it sold to Dorothy Meadors, into a residential subdivision. According to Plaintiffs' complaint, the boundary between their property and Defendant's property is the center of Clear Creek. Plaintiffs claimed Defendant was asserting that he was the owner of a portion of their property and was driving away Landworks' customers from the property and making threats. Landworks sought to hold Defendant liable for interfering with its business opportunities. Landworks asserted that because of Defendant's wrongful actions, it was forced to file suit to determine the proper boundary line pursuant to Tenn. Code Ann. § 16-11-106. Plaintiffs further claimed Defendant should be held liable for costs, attorney fees and lost profits. Plaintiffs also sought a restraining order pending a final hearing on the matter.

Defendant claimed, in his answer, that he was the proper owner of the land in dispute. Defendant claimed the disputed land was purchased by his predecessor in title in 1922. Defendant went on to explain in his answer that:

In 1922 the Register's Office did not have facilities to photocopy the original deed. The records in the Register's Office were created by clerk's hand writing a copy of the original deed. In the process of hand writing the contents of the deed a mistake was made by the transcriber in that certain calls contained in the original deed were left out of the transcribed/recorded copy. The call(s) left out of the transcribed/recorded copy of the deed were the portions of the deed conveying to J.T. Vick the premises lying east of Clear Creek, the area in dispute in this cause. . . . The preparers of warranty deeds conveying the property now owned by the Defendant perpetrated the same error of the missing calls.

Defendant then filed a counter-claim alleging that Plaintiff trespassed on his property. Defendant sought removal of the items which Landworks had placed on the property and for the cloud on his title to be removed. Plaintiffs denied the allegations in the counter-claim and asserted as an affirmative defense that not only did they have title to the disputed property, but they also were owners of the property by adverse possession because their predecessors in title had owned, possessed, farmed and otherwise used the property by both deed and possession adverse to "all the world" for longer than 50 years. Defendant then amended his answer and counter-claim to assert that he was entitled to the property by adverse possession.

As in most property disputes, the “facts” are numerous, hotly disputed, and critical to the decision. This being so, we will discuss in some detail the underlying evidence presented to the Trial Court.

Plaintiffs called Billy Knight (“Knight”) as an expert witness. Knight has been a licensed surveyor since 1979 and was employed by Plaintiffs to survey the property in question. When conducting the survey, Knight had the deeds of Landworks and its predecessor in title, Scott Vick. He also had the deeds of Defendant and his predecessor in title, his father, Elmer Vick. Knight also reviewed title papers dating back to 1879. Knight essentially testified that the Scott Vick property is on the east side of Clear Creek and the John Vick property is on the west side. Utilizing the chain of title to the Scott Vick property which dated back to 1879, the dividing line between the property has always been the center of Clear Creek. Knight also testified that a fence runs along the bank of the creek but the fence is not as far east as where the John Vick deed locates the boundary. Knight testified that prior to the trial, he reviewed the survey prepared by Defendant’s expert, Mr. Coffey, and other than the disputed area, the two surveys are in accord as to the remaining boundaries for the two properties. Knight testified the Scott Vick deed was clear when it stated that the boundary line was the center of the creek. There were no natural land markings in the John Vick deed referencing the boundary between the two properties. In fact, Knight stated that one of the calls in the John Vick deed was “bogus” because it overshot the location of the stake it referenced and went up the side of the bank to the creek. Specifically, Knight testified on cross-examination as follows:

Q. The difference between the Scott Vick deed and the John Leslie Vick deed is that Scott Vick’s deed follows the creek, meanders of the creek?

A. Specifically follows the creek.

Q And John Vick deed does not reach the creek?

A. It goes beyond. It doesn’t reach the creek from the point of beginning, it doesn’t quite make it there and then when it leaves it overshoots the creek and goes up the side of the hill.

The next expert witness was Michael Ivy (“Ivy”), a licensed surveyor in the State of Tennessee since 1995. Plaintiffs employed Ivy to survey the property. He utilized the same deeds and instruments relied upon by Knight. Ivy stated that the deeds in the chain of title for the Scott Vick deed starting from 1879 to the present call for the center of the property to be the meanders of Clear Creek. Ivy also stated that the location of the cow fence did not coincide with any of the calls in any of the deeds as far as boundary lines were concerned. Ivy stated that other than the creek and the spring, there were no natural monuments in the disputed area.

Defendant’s expert’s witness was Mr. Daniel Coffey (“Coffey”). Coffey testified the John Vick deed calls for the boundary to cross over the creek to the east side, which is in direct

conflict with the Scott Vick deed. Coffey acknowledged the John Vick deed had been erroneously transcribed. Coffey stated:

I traced the [John Vick] deed back hoping to get to its source in the original handwritten. I found out that when property is conveyed in the family a lot of times the deed is copied erroneously so perhaps I could get to the true meaning of what was their intent by looking at the earlier handwritten deed. We got back to a 1922 deed that had the calls in it that everybody is saying one of the calls was left out. That I thought was the original deed that's recorded I believe in Deed Book 43, Page 190. After we finished the survey Mr. Vick presented the original deed that was allegedly recorded in that same deed book and page those two had a discrepancy between the two. They didn't have copying machines in 1922. The deed recorded at the Courthouse and the deed in Mr. Vick's possession, the original deed, were different. That call was missing on the one recorded at the Courthouse. So in my exuberance to trace back to the original I perhaps overlooked some of the facts....When I traced back to the Deed Book 43, if you leave out the call that was left out, you couldn't tell which side of the creek that that would have went on....By tracing the deeds back I thought that had got to the source but apparently I just got to the source of where the ambiguity began.

Coffey also testified about an auction flyer for property to be sold at an auction on August 31, 1922. Coffey believed this document appeared "to be the document that the 1922 deed was written from." It "said this is what they're going to sell at auction" This document showed the property line as being east of Clear Creek. Coffey admitted he saw no evidence of any natural monument or fence in the field where this document purported to show the boundary line between the property at issue.

The next trial witness called by Plaintiffs was Robert Seigler, a real estate agent and the father of Bryan Seigler who operates Landworks Inc. Robert Seigler testified that during the process of this lawsuit, he searched the records and chain of title several times. He reviewed a Court Decree from 1879 which shows a division of the property consistent with those contained in his son's deed and the predecessor deeds from 1879 to the present. All of these deeds show the boundary line to be the center of Clear Creek.

Plaintiffs also called as a witness Thomas Vick, the son of Scott Vick. Thomas Vick was one month old when his family moved on the property in October of 1936. After his parents passed away, he obtained a copy of their deed which showed the property line to be the center of Clear Creek. Thomas Vick claimed he never heard any disagreement between his father and his uncle Elmer Vick over where the boundary line between the two pieces of property was located. He is not aware of his uncle ever claiming to own the property now in dispute. Thomas Vick testified his family maintained the property up to the cow fence. The cow fence, which was close to the creek bank on the east side of the creek, was there from his earliest recollection. The location of the fence

allowed the cattle access to the creek and to shade trees across the creek. After his father passed away, Thomas Vick recalled only one conversation with John Vick about the disputed property, which he described as follows:

One time I was standing up at the road, went down the road and John was standing up there at the road and I stopped. He said how about helping me get part of that bottom over there. I said what. He said help me get part of that bottom. I said that bottom belongs to us. I got in my car and left.

Plaintiffs' next witness was James Vick, the older brother of Thomas Vick and the son of Scott Vick. He and his siblings sold the property to Bryan Seigler after their parents passed away. James Vick testified he was not aware of any dispute between his father and uncle over where the boundary between their respective property was located. James Vick went on to state that "we always figured it was the center of the creek but you can't put a fence in the center of a creek." The fence was erected to keep cattle out of the fields. Since it had to be on one side or the other, he "always felt that since that side was higher than the other side and my granddaddy needed access to the water worse than we did that they put it up on the high side." James Vick further stated that John Vick never said anything to him about claiming he owned any land east of the creek. James Vick indicated that the fence is currently in the same location as it was when he moved onto the property when he was four years old.

Delmar Williamson ("Williamson"), the Property Assessor for Cocke County, was called to testify. Williamson provided the Trial Court copies of tax maps on the two tracts of land dating back to 1968 and 1969. Williamson testified that Elmer Vick (and subsequent owners of that tract) were assessed taxes on the west side of Clear Creek, and Scott Vick (and subsequent owners of that tract) were assessed taxes on the land to the east of Clear Creek. During the time Williamson was employed in the Property Assessor's office, as well as the 16 years in which he has been the Property Assessor, the two properties have been taxed based on Clear Creek dividing the two tracts. Williamson testified that if an individual has a problem with the amount of land on which they are being taxed, it is up to that individual to bring it to his attention. His office does not have the ability to establish boundaries.

Plaintiffs' next witness was Bryan Seigler, the president of Landworks, a land development company focusing primarily on residential subdivisions. Landworks bought the Scott Vick property for the purpose of building a residential subdivision. One of the lots was sold to Meadors. The deed to Meadors shows her property line going to the center of Clear Creek, as do the deeds of the other lots sold (or to be sold) on that side of the property. Bryan Seigler stated that after he bought the property and began developing it, John Vick came up to him and said he (i.e. John Vick) owned the creek. When this occurred, Landworks was actually in the process of building the subdivision. Bryan Seigler testified he lost at least two sales and potentially a third as a result of the actions of John Vick. He also had to pay for surveyors, attorneys, etc. Mr Seigler has paid the property taxes on the property all the way to the center of the creek since he purchased it from James

and Thomas Vick and their other siblings. All of the deeds in his chain of title establish the boundary line between the properties to be the center of Clear Creek.

Defendant's first lay witness was Harry Vick, Defendant's brother. Harry Vick testified to a conversation he claims to have overheard approximately 28 years ago between his father and his uncle, Scott Vick. In this conversation, his father and uncle were discussing the boundary line between the property which they said came down to somewhere around the spring and it went out through the middle of the bottom to a point in the creek. He also remembered a conversation where his father and uncle had baled some hay from the area in dispute, and Scott Vick apparently acknowledged the hay was not his and did not come from his land. The next witnesses were Wayne and Mike Vick, brothers of John and Harry Vick. Wayne and Mike Vick testified consistent with Harry Vick that the boundary line was not the middle of the creek or where the fence is located, but rather was somewhere east of the fence in the bottom.

Defendant also testified. Defendant grew up on his father's farm and his Uncle Scott had the farm next to them. Defendant purchased the farm from his father and the boundary line between the properties went through the spring bottom. While he did not know the exact boundary, he knew approximately where it was. He could tell where the boundary line was because his uncle Scott Vick kept the creek banks cleared off while his father Elmer Vick did not. John Vick stated that his cattle wander over on to the east side of the creek up to the fence. He claims he has maintained the fence. He is not aware of any dispute between his father and uncle as to where the boundary was located. John Vick testified he saw Bryan Seigler on the property one day and introduced himself to Mr. Seigler. Mr. Seigler explained to him how the lots he had divided up were going to be more expensive because they came up to the creek. He told Mr. Seigler they did not go to the creek because he (John Vick) owned that land. In July of 2000, John Vick re-recorded his deed because the original deed was missing a call.

The Trial Court found that the disputed area was covered in the deeds in the chain of title for each of the respective parties and the problem dated back at least to 1886. The deeds in the chain of title to the Scott Vick property clearly called for the boundary to be the center of Clear Creek. Likewise, the deeds in the chain of title for the property currently owned by John Vick provide for a boundary east of Clear Creek. The Trial Court also found that based on the proof introduced, there was no way to tell where the mistake initially was made. According to the Trial Court, the evidence was "absolutely disputed" about where the parties themselves thought the boundary line was. The Trial Court then stated as follows:

The clearest thing to the Court here is that at least since 1969 Elmer Vick now John Vick has only been assessed with county land taxes on the property that lies to the west of Clear Creek in the disputed area, and that Scott Vick through his children and his heirs now Land Works and Ms. Meadors have been assessed with and paid taxes on the property that lies to the east of the creek. Be that correct or incorrect based upon the deeds, that is what Delmar Williamson said. Scott Vick assessed with land up to the creek on the east side

of the creek, Elmer Vick assessed with taxes on land up to the creek lying to the west. As I say, be that correct or incorrect, that is what Delmar Williamson has said. And his tax maps filed in the record here bear him out.

And the Court is constrained to hold that there has been more than twenty years' worth of payment of taxes on this property even if John Vick and his contention about the old deed, even if it is correct.... But even assuming that John Vick is correct in his contention it's clear to me that his side has not paid taxes on this property in more than thirty years. They haven't even been assessed with it. You can't pay property taxes on something that you're not assessed for.

And on the other hand it is clear to me that Land Works and their predecessors it title have paid taxes on the property up to the creek on the [east]....

And we have two statutes in Tennessee under the section in the Code that generally deal with adverse possession, all kinds of adverse possession, and these two statutes, 28-2-110 and 28-2-109 hold that even if you absolutely own a piece of property, no question about it, no argument about it and every surveyor in the world comes in and says oh, yes, that's in his deed, he owns it, got clear title, but you don't pay taxes on it for twenty years and your neighbor does, if he can prove that, if your neighbor can prove that and it is difficult to prove, but if he can prove that, he's got it.

And on the other hand if that same piece of property that you own and you know you own and you know that you're not getting a tax bill on it and you don't go to the Tax Assessor and say look, that's my property, I want you to take it off my neighbor, I want you to put it on mine, it's my property, I want to pay the taxes on it, if you don't pay taxes on it for twenty years you can't get it back, even though you actually owned it.

The Trial Court then noted that the above-referenced statutes create only a rebuttable presumption. Nevertheless, the Trial Court concluded that Defendant had not met his burden of overcoming the presumption, noting that there was a clear factual dispute over ownership. The evidence, according to the Trial Court, was simply insufficient to overcome the statutory presumption. Based on the foregoing, the Trial Court held that the boundary of the property was the center of Clear Creek. Although Plaintiffs were successful in this regard, the Trial Court also held there was no basis for an award of damages to Plaintiffs in light of the fact that both parties made a claim to the land in dispute based on deeds and the chain of title for their respective deeds. The

Trial Court also rejected Defendant's claim that he should be awarded the property on the basis of adverse possession. In so doing, the Trial Court concluded that while Defendant and his predecessors may have used the property up to the fence, the Scott Vick family simply acceded to that use. "If he acceded to it then there certainly wasn't anything adverse about it."

Defendant appeals raising three issues: (1) whether the Trial Court erred in holding that Tenn. Code Ann. §§ 28-2-109 and 28-2-110 were relevant; (2) whether the Trial Court erred in concluding that Defendant did not own the property at issue by reason of adverse possession; and (3) whether the Trial Court erred in holding that Plaintiffs were the proper owners of the disputed area. Plaintiffs argue that Defendant's appeal is a frivolous appeal in violation of Tenn. Code Ann. § 27-1-122.

Discussion

A review of findings of fact by a trial court is *de novo* upon the record of the trial court, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *Brooks v. Brooks*, 992 S.W.2d 403, 404 (Tenn. 1999). Review of questions of law is *de novo*, without a presumption of correctness. *See Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

In resolving the factual issues presented for appeal, we must keep in mind that the Trial Court heard the conflicting testimony from the parties and the descendants of Scott Vick and Elmer Vick pertaining to where these individuals believed the boundary to be, who utilized the property, etc. "Unlike this Court, the trial court observed the manner and demeanor of the witnesses and was in the best position to evaluate their credibility." *Union Planters Nat'l Bank v. Island Mgmt. Auth., Inc.*, 43 S.W.3d 498, 502 (Tenn. Ct. App. 2000). The trial court's determinations regarding credibility are accorded considerable deference by this Court. *Id.*; *Davis v. Liberty Mutual Ins. Co.*, 38 S.W.3d 560, 563 (Tenn. 2001). "[A]ppellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary." *Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999).

The relevant statutory provisions we must address in resolving this appeal are Tenn. Code Ann. §§ 28-2-109, 28-2-110, which we quote:

28-2-109. Presumption of ownership from payment of taxes. –

Any person holding any real estate or land of any kind, or any legal or equitable interest therein, who has paid, or who and those through whom such person claims have paid, the state and county taxes on the same for more than twenty (20) years continuously prior to the date when any question arises in any of the courts of this state concerning the same, and who has had or who and those through whom such person claims have had, such person's deed, conveyance, grant or other assurance of title recorded in the register's office of the county

in which the land lies, for such period of more than twenty (20) years, shall be presumed prima facie to be the legal owner of such land.

28-2-110. Action barred by nonpayment of taxes. – (a) Any person having any claim to real estate or land of any kind, or to any legal or equitable interest therein, the same having been subject to assessment for state and county taxes, who and those through whom such person claims have failed to have the same assessed and to pay any state and county taxes thereon for a period of more than twenty (20) years, shall be forever barred from bringing any action in law or in equity to recover the same, or to recover any rents or profits therefrom in any of the courts of this state....

Defendant first challenges the applicability of these statutes arguing that they do not apply to boundary line disputes, but rather apply only to ejectment actions, suits for possession of realty, or a suit to quiet title. We believe this argument is without merit. While Plaintiffs do not style their lawsuit by any particular name (e.g. suit to quiet title, suit for possession, etc.), it is nonetheless clear that the objective of Plaintiffs' lawsuit is to remove the cloud on Plaintiffs' title and to seek a determination that they are entitled to possession of the disputed property. Defendant's attempt to characterize this action solely as a boundary line dispute is of no consequence. We note that Tenn. Code Ann. § 28-2-110(a) "has been applied in a suit to remove cloud on title. *Lee v. Harrison* (1954) 196 Tenn. 603, 270 S.W.2d 173. It also was applied and held to bar a suit by a plaintiff claiming property described in her deed which was also encompassed in a deed made to the defendant. *Alexander v. Patrick* (Tenn. App. 1983) 656 S.W.2d 376." *Tidwell v. Van Deventer*, 686 S.W.2d 899, 902-903 (Tenn. Ct. App. 1984). *See also Bone v. Loggins*, 652 S.W.2d 758, 761 (Tenn. Ct. App. 1982)("Although the appellees' suit is titled a suit for partition, the whole purpose of the suit is to remove any cloud that may exist on the title. Therefore, if in fact the appellees have failed to pay the taxes for more than twenty years, and if the appellants have standing to raise the defense, the statute would bar this action."). We conclude that Tenn. Code Ann. §§ 28-2-109 and 28-2-110 apply in this case, if the other necessary elements of the statute are present.

In *Alexander v. Patrick*, 656 S.W.2d 376, 377 (Tenn. Ct. App. 1983), both plaintiff and defendant claimed to own a certain tract of property. After concluding that the evidence did not preponderate against the trial court's finding that defendant had paid taxes on the land for at least 20 years, we affirmed the dismissal of plaintiff's lawsuit stating:

We hold that where one claiming an interest in real property or his predecessor in title has failed to have assessed and to pay taxes on the claimed property for at least twenty continuous years and those taxes have been assessed to and paid by another claimant, T.C.A. § 28-2-110 will act as an absolute bar to any suit by the one so failing.

The foregoing holding was cited with approval by our Supreme Court in *Burress v. Woodward*, 665 S.W.2d 707, 709 (Tenn. 1984).

In the present case, the Trial Court found that Plaintiffs and their predecessors in title have paid the taxes on this land since at least 1969, and that Defendant and his predecessors in title have not. The evidence does not preponderate against this finding. In light of *Burress* and *Alexander*, we affirm the dismissal of Defendant's counter-claim to have the cloud on his alleged title removed as such an action is barred by Tenn. Code Ann. § 28-2-110. While Defendant is precluded from bringing his counter-claim by this statute, he still may *defend* his claim to title in Plaintiffs' lawsuit. See *Burress v. Woodward*, 665 S.W.2d 707, 709 (Tenn. 1984)(A party is "restricted under the statute from bringing suit because of failure to pay taxes for a period of more than twenty years. However ... 'nothing in § 28-2-110 prevents Defendants from defending their title'" (citation omitted)).

Having affirmed the dismissal of Defendant's counter-claim pursuant to § 28-2-110, we now turn to the claims raised by Plaintiffs in their Complaint. Under Tenn. Code Ann. § 28-2-109, Plaintiffs are entitled to a rebuttable presumption of ownership if their deed or that of their predecessors in title were recorded in the register's office for a period of at least twenty years *and* they have paid taxes on the property for at least 20 years. The evidence does not preponderate against the Trial Court's finding that both elements have been met in this case, and, therefore, we conclude, as did the Trial Court, Plaintiffs are entitled to the rebuttable presumption created by this statute. Simply because Defendant showed that his deed and that of his predecessors in title also were recorded in the register's office for a period of at least twenty years does not change the fact that Plaintiffs could, and did, establish these two elements.

It is undisputed that both parties claimed ownership to the disputed property by way of deed. It is also undisputed that there was conflicting testimony as to where the various members of the Vick family considered the boundary line to be. Based on our review of the entire record, we conclude the evidence does not preponderate against the Trial Court's determination that the rebuttable presumption created by Tenn. Code Ann. § 28-2-109 was not overcome by Defendant, and, therefore, Plaintiffs were the owners of the disputed property.

We next address Defendant's argument that he is entitled to ownership of the disputed property up to the fence by way of adverse possession. In *Holley v. Haehl*, No. M1999-02105-COA-R3-CV, 2000 Tenn. App. LEXIS 619 at **10, 11 (Tenn. Ct. App., Sept. 14, 2000)(no Rule 11 app. for perm. to appeal filed), the following is found:

Adverse possession must be just that: adverse. This Court has held that, in order to be adverse, possession "must be of such a character as to leave no doubt of claim of ownership by adverse possession and to give notice to the public of the possession and the claim." *Blankenship v. Blankenship*, 658 S.W.2d 125, 127 (Tenn. Ct. App. 1983). We have also held that the party claiming ownership by adverse possession "must sustain the proposition that the possession was in fact adverse to the true owner. *Bynum v. Hollowell*, 656 S.W.2d 400, 403 (Tenn. Ct. App. 1983).... [T]he burden of establishing by clear and positive proof such adverse possession is on

the adverse possessor. *See Whitworth v. Hutchison*, 731 S.W.2d 915, 917 (Tenn. Ct. App. 1986) (citing *Jones v. Coal Creek Mining and Mfg. Co.*, 133 Tenn. 183, 180 S.W. 991 (1915); *Davis v. Louisville & N.R. [Co.]*, 147 Tenn. 1, 244 S.W. 483 (192[2])). This rule applies to both the length of time and the character of possession. *Id.* Evidence of adverse possession is strictly construed and any presumption is in favor of the holder of the legal title. *Moore v. Brannan*, 42 Tenn. App. 542, 304 S.W.2d 660, 667 (Tenn. Ct. App.195[7]).

Whether or not Defendant met the elements of adverse possession required factual determinations by the Trial Court. After hearing all of the proof, the Trial Court concluded that Defendant's use of the property was not adverse. The Trial Court found the Scott Vick family simply let Defendant and his predecessors use the property. As noted by the Trial Court: "If [they] acceded to it then there certainly wasn't anything adverse about it." We hold the evidence does not preponderate against this factual finding of the Trial Court, and, therefore, affirm as to this issue.

The final issue is a claim by Plaintiffs that this appeal is frivolous, and they should be awarded costs and attorney fees, etc. We do not believe the appeal is frivolous and decline to so hold.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for such further proceedings as may be required, if any, consistent with this Opinion and for collection of the costs below. The costs on appeal are assessed against the Appellant, John Leslie Vick, and his surety.

D. MICHAEL SWINEY, JUDGE